Supreme Court, U.S.
FILED
MAR - 8 2000
CLERK

(4)

No. 99-1235

IN THE
Supreme Court of the United States

GREEN TREE FINANCIAL CORP.—ALABAMA, AND GREEN TREE FINANCIAL CORPORATION,
Petitioners,

v.

LARKETTA RANDOLPH,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONERS

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON & GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

March 8, 2000

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

14pp

TABLE OF AUTHORITIES

CASES

	Page
Altman Nursing, Inc. v. *Clay Capital Corp.*, 84 F.3d 769 (5th Cir. 1996)	4
Cole v. *Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997)	6, 7, 8
Coopers & Lybrand v. *Livesay*, 437 U.S. 463 (1978)	6
Deposit Guar. Nat'l Bank v. *Roper*, 445 U.S. 326 (1980)	6
Dobbins v. *Hawk's Enters.*, 198 F.3d 715 (8th Cir. 1999)	9
Gammaro v. *Thorp Consumer Discount Co.*, 15 F.3d 93 (8th Cir. 1994)	4
Grayson v. *K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996)	3
Humphrey v. *Prudential Sec. Inc.*, 4 F.3d 313 (4th Cir. 1993)	4
Koveleskie v. *SBC Capital Markets, Inc.*, 167 F.3d 361 (7th Cir.), *cert. denied*, 120 S. Ct. 44 (1999)	9
Mastrobuono v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)	7
McCarthy v. *Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 275 (1998)	3, 4, 5
Napleton v. *General Motors Corp.*, 138 F.3d 1209 (7th Cir.), *cert. denied*, 119 S. Ct. 341 (1998)	4, 5
Rosenberg v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1 (1st Cir. 1999)	8, 9
Seacoast Motors of Salisbury, Inc. v. *Chrysler Corp.*, 143 F.3d 626 (1st Cir.), *cert. denied*, 119 S. Ct. 410 (1998)	3, 4
United States v. *Wallace & Tiernan Co.*, 336 U.S. 793 (1949)	3

FEDERAL STATUTES

9 U.S.C. § 10	9
§ 16(a)(3)	*passim*

SUPREME COURT RULE

Sup. Ct. R. 10(a)	6

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page

15A Charles Alan Wright et al., *Federal Practice & Procedure* (2d ed. 1992) 3

18 Charles Alan Wright et al., *Federal Practice & Procedure* (1981) 6

REPLY BRIEF OF PETITIONERS

In their petition, Green Tree Financial Corp.—Alabama and Green Tree Financial Corporation demonstrated that review by this Court was necessary to resolve a deep conflict among the circuits regarding whether, under 9 U.S.C. § 16(a)(3) ("Section 16(a)(3)") of the Federal Arbitration Act ("FAA"), they have jurisdiction to review a district court's dismissal of a case in favor of arbitration. Pet. 12-13, 14-22. Further, petitioners showed that the decision below holding that the arbitration provision was unenforceable because it was "silent" on the issue of costs and fees was in direct conflict with decisions of this Court and the courts of appeals. *Id.* at 13-14, 23-29. Respondent's Opposition calls none of these reasons for granting certiorari into question.

First, respondent acknowledges, Opp. 6-7, that there is a deep conflict among the courts of appeals as to the proper interpretation of Section 16(a)(3). Moreover, contrary to her arguments, this case squarely presents that conflict because courts of appeals adopting the majority standard ignore the "label" chosen by the district court and dismiss embedded proceedings like the one for lack of appellate jurisdiction. By contrast, under the minority standard, the Eleventh Circuit held that it could exercise jurisdiction. Second, as to the enforceability of the arbitration agreement, respondent concedes that the decision below conflicts with the D.C. Circuit, *id.* at 14 n.8, and her efforts to distinguish decisions by the First, Seventh and Eighth Circuits merely underscore the extent of the conflict and the need for review by this Court. Finally, respondent's effort to litigate the merits of these questions, *id.* at 17-22, is not relevant to the issue of certiorari, and, in any event, is wrong. In short, the petition presents two important and recurring questions of federal law that have generated conflicts among the courts of appeals and warrant final resolution by this Court.

1. Respondent agrees that (1) the courts of appeals are deeply divided regarding the proper interpretation of Section 16(a)(3), Opp. 6; (2) two competing legal frameworks for deciding this jurisdictional issue have developed, *id.* at 6-7; (3) the Eleventh Circuit below fully recognized and considered the conflict among the courts of appeals, *id.* at 8; and (4) the Eleventh Circuit rejected the embedded/independent framework adopted by the First, Second, Third, Fourth, Fifth, Seventh, Eighth and Ninth Circuits, *id.* at 6-7, and instead embraced the minority view held by the Sixth and Tenth Circuits, *id.* at 6. Further, respondent does not and cannot dispute that this conflict presents an important and recurring federal question that warrants review by this Court.

Instead, respondent asserts that this case is "an improper vehicle for resolving [this] conflict," Opp. 4, because the district court's dismissal "*with prejudice*" makes the decision below "*far different* from the majority of cases that have addressed the availability of review of an order compelling arbitration," *id.* at 7 (second emphasis added). Similarly, respondent maintains that review is unwarranted because her case involved a putative class action and therefore this Court would be "encumber[ed]" by questions regarding "consequences for members of the putative class if such an immediate appeal were unavailable." *Id.* at 9. Neither argument provides any basis for denying review because the "distinctions" seized upon by respondent have no bearing on the circuit conflict or this Court's ability to resolve it.

a. Contrary to respondent's principal argument, the "procedural posture" of this case makes it an ideal vehicle to resolve the issue of appellate jurisdiction under Section 16(a)(3). First, the Eleventh Circuit, in language that respondent studiously avoids, made clear that its rejection of the majority embedded/independent framework was outcome determinative:

> [I]f we followed the other circuits (save the Sixth and Tenth) and attached excessive significance to the "embedded" versus "independent" proceeding distinction, . . . *we* [*would*] *lack jurisdiction here.*

Pet. App. 11a (emphasis added). That is, the court of appeals expressly recognized that its adoption of the minority rule—and not the label affixed to the dismissal by the district court—was the basis for its decision in this case. *Id.* Indeed, although it noted that the district court dismissed this case "with prejudice," *id.* at 14a, the Eleventh Circuit quickly acknowledged that dismissals *without* prejudice (like dismissals *with* prejudice) are " 'appealable' " as a general matter. *Id.* at 14a n.5 (quoting *Grayson* v. *K Mart Corp.*, 79 F.3d 1086, 1094 n.7 (11th Cir. 1996)).[1] Simply put, the "nature" of the dismissal had no bearing on the decision below.

Second, the label affixed to the district court's dismissal also is irrelevant to the decisions by the courts of appeals adopting the embedded/independent framework. As the Eleventh Circuit explained, courts of appeals adopting the majority rule often do "not clearly state the nature of the dismissal." Pet. App. 14a; see, *e.g.*, *Seacoast Motors of Salisbury, Inc.* v. *Chrysler Corp.*, 143 F.3d 626, 627 (1st Cir. 1998) (district court dismissed case "with costs"); *McCarthy* v. *Providential Corp.*, 122 F.3d 1242, 1243 (9th Cir. 1997) (district court "decided to dismiss, rather than stay, the action"). The fact that circuits adopting the majority embedded/independent approach do not emphasize "the nature of the dismissal" is not surprising because these circuits do not consider this factor relevant to the jurisdictional question. For example, in the Fifth Circuit, an order compelling arbitration in "an embedded

---

[1] *See also United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, 794 n.1 (1949) ("That the dismissal was without prejudice . . . does not make the cause unappealable."); 15A Charles Alan Wright et al., *Federal Practice & Procedure* § 3914.6, at 533 (2d ed. 1992) ("[D]ismissal without prejudice is appealable." (citing cases)).

proceeding is *always* an interlocutory order." *Altman Nursing, Inc.* v. *Clay Capital Corp.*, 84 F.3d 769, 771 (5th Cir. 1996) (emphasis added). Similarly, in the Eighth and Fourth Circuits " 'an embedded proceeding may not give rise to a final decision subject to section 16(a)(3) review, *even when all the claims in which the arbitration issue is embedded are resolved.*' " *Gammaro* v. *Thorp Consumer Discount Co.*, 15 F.3d 93, 96 (8th Cir. 1994) (emphasis added) (quoting *Humphrey* v. *Prudential Sec. Inc.*, 4 F.3d 313, 318 (4th Cir. 1993)). To the same effect are the holdings of the First and Seventh Circuits which have concluded that " 'it is the nature of the underlying action, *not the style of the district court's decision requiring arbitration*, that determines whether we have jurisdiction over appeals from decisions granting arbitration.' " *Seacoast Motors*, 143 F.3d at 629 (emphasis added) (quoting *Napleton* v. *General Motors Corp.*, 138 F.3d 1209, 1212 (7th Cir. 1998)). In sum, under the majority rule, the only question that is relevant to determining appellate jurisdiction under Section 16(a)(3) is whether the proceeding was embedded or independent because an order compelling arbitration in an embedded proceeding is not appealable "regardless of the terminology used by the trial court." *McCarthy*, 122 F.3d at 1245.

As a result, respondent is simply wrong to argue that the district court's dismissal "with prejudice" makes this case "far different from the majority of cases that have addressed the availability of review of an order compelling arbitration," Opp. 7. Respondent fails to explain how this case would be different in any material respect if the dismissal were designated "without prejudice." Indeed, the decisions adopting the majority position have explained that such distinctions are of no moment because allowing the " 'style of the district court's decision' " to control the issue of appellate jurisdiction would "elevat[e] form over substance," *Seacoast Motors*, 143 F.3d at 629. and "leave the jurisdictional trump card in the hand of

the district court," *Napleton*, 138 F.3d at 1213. As the *McCarthy* court noted, Congress could not have intended that appellate jurisdiction would turn on the "terminology used by the trial court." 122 F.3d at 1245.

In the end, if this case had been decided by one of the courts of appeals that has adopted the majority standard, it would have been dismissed for lack of jurisdiction. Because it was decided in a circuit applying the minority rule, however, the Eleventh Circuit ruled that it had jurisdiction. Accordingly, this case is an ideal vehicle to resolve this undisputed and well-developed circuit conflict.

b. Similarly baseless is respondent's claim that review should be denied because the class allegations advanced in respondent's Second Amended Complaint "would encumber this case, making it far from ideal for review." Opp. 9. First, respondent provides absolutely no support for the proposition that courts of appeals can or should adopt different interpretations of Section 16(a)(3) depending on whether a plaintiff has brought suit (1) on her own behalf, or (2) on her own behalf, as well as for a putative class that has never been certified. Although she correctly notes that some of the cases creating this circuit conflict have involved "individual" suits, *id.* at 9, respondent quickly concedes that others involved putative class actions, *id.* at 10 (citing decisions by the Seventh, Eighth and Ninth Circuits). What respondent never acknowledges, however, is that none of these cases concluded or implied that the existence of class allegations had any bearing on their interpretation of Section 16(a)(3).

Nor does respondent provide any plausible reason that class actions should be treated separately for purposes of Section 16(a)(3). Rather, she argues that review of the jurisdictional issue "would inevitably call into question the consequences for members of the putative class if such

an immediate appeal were unavailable." Opp. 9.[2] To the extent that respondent is concerned that an adverse ruling would have a res judicata or collateral estoppel effect on putative class members, that fear is unfounded because the district court "declined to certify a class." Pet. App. 4a; see also 18 Charles Alan Wright et al., *Federal Practice & Procedure* § 4455, at 475-76 (1981) ("The most obvious limitation" on the doctrine of "[p]reclusion by class action representation" is "there must actually have been a class action."). To the extent she is concerned that the "putative class" members, and litigants nationwide, would be bound by a decision announcing a uniform national standard and therefore could no longer forum shop for a more favorable standard, that *concern* is, in fact, precisely the reason certiorari is appropriate in this case. See Sup. Ct. R. 10(a).

2. As to the enforceability of the arbitration agreement, respondent admits that the decision below conflicts with *Cole* v. *Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), Opp. 14 n.8, but nevertheless maintains that "there is no split among the circuit courts as to what constitutes the proper approach when determining the enforceability of an arbitration agreement," *id.* at 11. Similarly, while respondent acknowledges that "the arbitration agreement did not expressly impose the substantial costs of arbitration on Ms. Randolph," *id.* at 14, she steadfastly insists that the court of appeals' conclusion that such "silence" should be resolved *against* arbitration "in no way veers from" the "strong federal policy *favoring* arbitration and the presumption which exists in its *favor* when making arbitra-

---

[2] Indeed, the support for her statement that "[t]his Court has been mindful to allow appeals of district courts' rulings on certification," Opp. 10-11, is a case that confirms that class certification issues do "not fall within that narrow category of circumstances where appeal [is] allowed prior to final judgment as a matter of right." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 336 n.8 (1980) (citing *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978)).

bility determinations." *Id.* at 12, 11 (emphases added).[3] Certiorari should be granted independently because the decision below conflicts with that of other circuits which have applied the strong federal presumption in favor of arbitration and imposed the burden of proof on the party seeking to avoid arbitration.

Petitioners previously showed, Pet. 25-26, that the decision below conflicts with *Cole* v. *Burns International Security Services*. There, the D.C. Circuit upheld the enforceability of an arbitration agreement in the face of "silen[ce]" as to which party would bear the costs of arbitration, 105 F.3d at 1485-86, by interpreting it to require the employer "to pay all arbitrators' fees in connection with the resolution of the [employee's federal statutory] claims," *id.* at 1486. The *Cole* court adopted that interpretation "to uphold the validity of the parties' contract." *Id.* Although respondent never discusses *Cole*, she acknowledges, in a footnote, that *Cole* refutes her claim that "other circuits . . . are in accord with the approach taken by the Eleventh Circuit." Opp. 14 & n.8.

Recognizing that the decision below conflicts with *Cole*, respondent maintains, on the merits, that the Eleventh Circuit was correct to rule against arbitration because "ambiguity in the agreement" should be resolved against the drafter. Opp. 14 (citing *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995)). But *Mastrobuono* made clear that federal law requires that "ambiguities" in arbitration agreements be " 'resolved in favor of arbitration.' " 514 U.S. at 62 (interpreting ambiguous agreement against drafter *and* in favor of arbitration). Similarly, in *Cole*, the D.C. Circuit resolved ambiguity *against* the drafter but in *favor* of arbitration by requiring the employer who drafted the arbitration agreement to pay arbitration fees so that the arbitration

[3] Lacking any record evidence, respondent peppers her argument with allegations of "heavy" and "unaffordable" costs that would impose an "overwhelming burden" on respondent. Opp. 12-14.

agreement could be upheld. 105 F.3d at 1486. In stark contrast, the Eleventh Circuit ignored the federal command in *favor* of arbitration, and instead resolved "ambiguity" *against* arbitration. Pet. App. 17a-18a.

Moreover, respondent's efforts to distinguish conflicting circuit decisions do not withstand scrutiny. In *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 15 (1st Cir. 1999), plaintiff claimed that an arbitration agreement violated federal law because arbitrators refused "to award statutory attorneys' fees" and imposed "forum fees" on plaintiffs as high as "tens of thousands of dollars per case." *Id.* The *Rosenberg* court rejected that argument, concluding that (1) the arbitration agreement "d[id] not limit available relief" that could be awarded, (2) plaintiff failed to support the claim "that a plaintiff is asked to bear forum fees," and (3) "if unreasonable fees were to be imposed on a particular employee," then the argument that this result violated federal statutory rights "could be presented . . . to the reviewing court." *Id.* at 15-16. The decision below conflicts directly with each of these rulings.

First, nothing in petitioners' arbitration agreement prevents the arbitrator from waiving costs or awarding attorneys' fees to a prevailing party.[4] Unlike *Rosenberg*, the Eleventh Circuit, however, ruled that "silence" must be resolved *against* arbitration. Pet. App. 17a. Second, respondent failed to establish that costs or attorneys' fees would be borne by her. *Id.* at 17a-18a. Unlike *Rosenberg*, however, this complete failure of proof redounded to the benefit of respondent, the party seeking to invalidate the arbitration agreement. Finally, respondent would be entitled to challenge any costs or fees imposed by the

[4] The agreement provides that "the arbitrator shall have all powers provided by the law and the Contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief." Pet. App. 57a.

arbitrator after the arbitration. See 9 U.S.C. § 10. Unlike *Rosenberg*, the Eleventh Circuit ignored that avenue for relief when it ruled that the risk that respondent "might" be required to bear the "costs of arbitration" was enough to invalidate the parties' agreement. What is more, the Seventh Circuit has adopted the analysis from *Rosenberg* to hold that a party's allegations regarding costs and fees did not render an arbitration agreement unenforceable. *Koveleskie* v. *SBC Capital Markets, Inc.*, 167 F.3d 361, 366 (7th Cir. 1999).[5] In short, the decision below fundamentally conflicts with the decisions of the First Circuit in *Rosenberg* and the Seventh Circuit in *Koveleskie*.

Finally, respondent misreads *Dobbins* v. *Hawk's Enterprises*, 198 F.3d 715 (8th Cir. 1999). Opp. 16. In *Dobbins*, the Eighth Circuit ruled that plaintiffs were required to minimize their fees *and*, if those efforts failed, to accept defendant's offer to "pay the arbitration fees." 198 F.3d at 717. In doing so, the *Dobbins* court resolved doubts *against* claims of unconscionable arbitration fees "to foster the policy in favor of arbitration." *Id.* In contrast, the Eleventh Circuit had no evidence of any fees, but nevertheless ruled that its self-imposed doubts should be construed *against* arbitration. Pet. App. 17a-18a.

3. Lastly, respondent addresses the issue of appellate jurisdiction and arbitration enforceability on the merits. Opp. 17-21. Although a full response here is neither possible nor warranted, several points deserve clarification.

First, respondent claims that the proper standard under Section 16(a)(3) should be whether the district court's order "leaves nothing for the court to resolve." Opp. 17. Under that standard, however, the district court unilater-

[5] Respondent does not address any of these rulings by the *Rosenberg* and *Koveleskie* courts. Instead, she emphasizes the irrelevant fact that the arbitration agreement in *Rosenberg* was not enforced because the party seeking enforcement failed to provide Rosenberg with materials as required by the agreement. 170 F.3d at 20.

BEST AVAILABLE COPY

ally would control the court of appeals' jurisdiction through the label it applies to its order compelling arbitration. If it chooses to enter a stay, there can be no immediate appeal; if it chooses to dismiss, then the court of appeals would have jurisdiction. As the circuits adopting the majority approach have explained, Congress did not and could not have intended to establish a system that elevates form over substance in such an irrational manner.

Second, respondent largely ignores the Eleventh Circuit's rationale and argues that the decision as to the enforceability of the arbitration agreement should be "sustained on [an] alternative ground." Opp. 19. Specifically, she contends that a class forum is necessary because "the limited financial recoveries likely to be obtained by each individual, make it extremely unlikely that many, if any, individuals would vindicate their rights through arbitration." *Id.* at 21. To support that claim, respondent contends that, in her *first* complaint, "[t]he relief to which Ms. Randolph [would be] entitled individually is estimated to be about $15.00." *Id.* at 2 (citing *first* Complaint dated Jan. 3, 1996). Respondent, however, neglects to disclose that the decisions below were made in reference to respondent's *third* complaint, which sought (1) statutory and actual damages under the Truth in Lending Act, (2) actual and punitive damages of up to $10,000 under the Equal Credit Opportunity Act, and (3) attorneys' fees, litigation expenses and costs of suit. See Second Amended Complaint at 5-6, *Randolph* v. *Green Tree Financial Corp.—Alabama*, No. CV-96-D-11-N (M.D. Ala. filed Dec. 10, 1996). In any event, the district court properly rejected this argument. Pet. App. 32a-34a.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT A. HUFFAKER
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON
& GARRETT, P.A.
184 Commerce Street
Montgomery, AL 36101-0270
(334) 206-3100

CARTER G. PHILLIPS *
PAUL J. ZIDLICKY
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

March 8, 2000

* Counsel of Record